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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

MICHELE FOTINOS, Plaintiff and Appellant, v. RENEE LAFARGE, Defendant and Respondent.	A126947 (San Mateo County Super. Ct. No. CIV 479780)

Plaintiff Michele Fotinos appeals from an order granting defendant Dr. Renee LaFarge's special motion to strike plaintiff's complaint pursuant to the anti-SLAPP (strategic litigation against public participation) statute, Code of Civil Procedure section 425.16.[1] We affirm.

Background

In July 2005, defendant, a licensed marriage and family therapist, was appointed by the court to facilitate reunification efforts in child custody proceedings involving plaintiff and her former husband. In December 2005, defendant filed a letter with the court advising against increased visitation between plaintiff and her children and reported to counsel for the children that she was recommending against further reunification therapy for the children and plaintiff. Shortly thereafter, the court awarded the father sole custody of the children and terminated defendant's appointment as the reunification therapist.

[1] All statutory references are to the Code of Civil Procedure unless otherwise noted.

Two years later, in December 2007, the family court entered an order transferring sole custody of the children to plaintiff. Days later, defendant was contacted by the children's court-appointed attorney, who indicated that she was concerned for the safety of the children. The attorney told defendant that the children ran away from home after the court changed their custody and were currently living in a foster home. On December 26, 2007, defendant filed a declaration with the family court advising the court of her "professional opinion that the children should not be ordered to return to their mother from foster care." The declaration states, based on her "three-year plus involvement" with the family, that "the children need to be returned to their father and remain with their father so their lives can regain some normalcy and peace." She explained that plaintiff "is primarily responsible for the children's inability to repair the parent child relationship," she "is not capable of parenting her children or protecting them," and "she is unable to exhibit compassion or empathy toward her children, thereby making it impossible for her to connect emotionally with them and repair her relationship with either child." The record does not indicate whether a change in custody occurred as a result of defendant's declaration.

In December 2008, plaintiff filed the present complaint against defendant alleging causes of action for professional malpractice arising out of defendant's alleged unauthorized filing of the December 2007 declaration. In April 2009, an amended complaint was filed alleging that defendant breached her duty of care by "negligently making fraudulent statements regarding her professional treatment" of plaintiff and "knowingly and intentionally made multiple fraudulent statements" about plaintiff in the December 2007 declaration. [2]

[2] The complaint also alleged causes of action for defamation, intentional infliction of emotional distress and negligent infliction of emotional distress that plaintiff dismissed without prejudice in May 2009.

Defendant filed a special motion to strike the complaint pursuant to section 425.16. Following a hearing, the court granted the motion and dismissed plaintiff's complaint in its entirety. Plaintiff filed a timely notice of appeal.[3]

Discussion

Section 425.16, subdivision (b)(1) provides "A cause of action against a person arising from any act of that person in furtherance of the person's right of petition or free speech under the United States Constitution or the California Constitution in connection with a public issue shall be subject to a special motion to strike, unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim." The Legislature enacted section 425.16 to allow a court to dismiss, at an early stage in the litigation, unmeritorious claims arising from constitutionally protected activity. (*Annette F. v. Sharon S.* (2004) 119 Cal.App.4th 1146, 1159.) Courts must broadly construe the statute to further the legislative intent of promoting participation in matters of public significance. (§ 425.16, subd. (a); *Kibler v. Northern Inyo County Local Hospital Dist.* (2006) 39 Cal.4th 192, 199.)

In ruling on an anti-SLAPP motion, the trial court engages in a two-step process. First, the court decides whether the defendant has met its burden to show the challenged cause of action is one arising from constitutionally protected activity, as defined in the statute. (*Equilon Enterprises v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53, 67.) Second, if this showing has been made, the court must determine whether the plaintiff has met its burden to show a probability of prevailing on the claim. (*Ibid.*) The court's ruling on a section 425.16 motion is subject to our independent review. (*Annette F. v. Sharon S., supra,* 119 Cal.App.4th at p. 1159.)

[3] Approximately two months after plaintiff filed her reply brief with this court, she moved to reopen briefing based on "newly discovered" evidence. The evidence is a declaration submitted by the children's attorney in the family law proceedings almost a year after the trial court struck the complaint in the present action. The declaration has no relevance to the present appeal and for that reason the motion was denied.

A. *Protected Activity*

Section 425.16, subdivision (e) defines protected activity to include, among other things, "(1) any written or oral statement or writing made before a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law; (2) any written or oral statement or writing made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law. . . ." In *Briggs v. Eden Council for Hope & Opportunity* (1999) 19 Cal.4th 1106, 1123 (*Briggs*), the court held that "under section 425.16, a defendant moving to strike a cause of action arising from a statement made before, or in connection with an issue under consideration by, a legally authorized official proceeding need *not* separately demonstrate that the statement concerned an issue of public significance." Rather, "plainly read, section 425.16 encompasses any cause of action against a person arising from any statement or writing made in, or in connection with an issue under consideration or review by, an official proceeding or body." (*Id*. at p. 1113.)

Defendant's December 2007 declaration is undoubtedly a written statement made in connection with an official judicial proceeding. Plaintiff suggests that the declaration was not submitted in connection with a court proceeding because the declaration was submitted by the children's attorney in connection with an ex-parte application six days after the custody order was entered. Plaintiff does not dispute, however, that the custody action was still pending before the court. The fact that the declaration was submitted in connection with an ex-parte application rather than a noticed hearing does not deprive it of the protection provided by section 425.16.

Plaintiff also argues that the submission of the declaration is not protected activity because defendant was "unauthorized to file her declaration in December 2007 since her court appointment had terminated two years prior." Citing numerous statutory provisions applicable to court appointed custody evaluators (Fam. Code, §§ 3110.5-3113, 3115-3118), plaintiff argues that defendant's unauthorized participation in the custody proceedings violated her due process rights. Plaintiff's argument mischaracterizes defendant's role in the proceedings.

Defendant's declaration was prepared, apparently at the request of the children's appointed counsel, as a percipient witness based on her prior experience with the family. Although defendant's opinion was based on her clinical experience with the family, she was not, as plaintiff suggests, "masquerad[ing] herself as a custody evaluator." Contrary to the implication of plaintiff's argument, there is no restriction, statutory or otherwise, on the ability of a therapist who previously performed a court-ordered evaluation and made recommendations to the court to submit a declaration in the family court action after the expiration of her court appointment.[4] Her conduct in doing so clearly comes within the scope of section 425.16, subdivision (e). Accordingly, defendant has established that plaintiff's claim arose from protected activity and the burden shifts to plaintiff to establish a probability of prevailing.

B. *Probability of Prevailing*

To meet this burden, plaintiff is required to present evidence to demonstrate that her claim is " ' "supported by a sufficient prima facie showing of facts to sustain a favorable judgment if the evidence submitted . . . is credited." ' " (*Taus v. Loftus* (2007) 40 Cal.4th 683, 713-714.) In deciding the potential merit issue, the trial court considers the parties' pleadings and admissible evidentiary submissions. (*Wilson v. Parker, Covert & Chidester* (2002) 28 Cal.4th 811, 821.) The court does not weigh the credibility or compare the strength of competing evidence, but merely determines if there is sufficient evidence to show the plaintiff can support with competent evidence each element of the claim. (*Ibid*.)

[4] Although plaintiff has not cited the provisions of the Evidence Code that designate persons who are not qualified or competent to testify (Evid. Code, §§ 701-704), we have considered those provisions and find them inapplicable. Although there are restrictions on the ability of a judge, arbitrator or mediator, or a juror to testify, defendant was not acting in any such capacity. To the contrary, defendant was expected to report her observations and recommendations to the court. No restrictions were placed upon her ability to do so at a later time should her observations be relevant at a later stage of the proceedings.

Defendant contends that the litigation privilege in Civil Code section 47, subdivision (b), bars all of plaintiff's claims.[5] (*Wise v. Thrifty Payless, Inc.* (2000) 83 Cal.App.4th 1296, 1302 ["section 47(b) absolutely protects litigants and other participants from being sued on the basis of communications they make in the context of family law proceedings"].) "To be privileged a statement must (1) be made in a judicial proceeding, (2) by litigants or other authorized participants, (3) aim to achieve the litigation's objects, and (4) have some logical connection or relation to the proceeding." (*O'Keefe v. Kompa* (2000) 84 Cal.App.4th 130, 134.) Plaintiff acknowledges that generally a witness is an authorized participant, but reiterates her argument that the privilege does not apply in this instance because defendant's court appointment had terminated two years before. She also argues that the declaration is not privileged insofar as it disclosed private medical information about plaintiff in violation of her constitutional and statutory privacy rights.

As discussed above, plaintiff has failed to cite any statute that precludes a therapist who has previously served as a court-appointed evaluator from subsequently submitting a declaration in those family court proceeding without prior authorization from the court. Plaintiff may be correct that court appointed evaluators are subject to numerous regulations, but none preclude defendant's conduct here.

[5] Plaintiff contends that defendant waived any claim of privilege under section 47, subdivision (b), because it was not asserted below. First, although defendant only argued that the declaration was entitled to qualified immunity under section 47, subdivision (c), plaintiff raised in her opposition brief the issue of absolute immunity under section 47, subdivision (b) and asked the court at the conclusion of the hearing for a ruling on whether defendant was an "authorized participant" within the meaning of subdivision (b). Even if the issue was not raised below, " 'it is well settled that when the issue raises a pure question of law . . . , we may consider the issue for the first time on appeal.' " (*Shafer v. Berger, Kahn, Shafton, Moss, Figler, Simon & Gladstone* (2003) 107 Cal.App.4th 54, 77-78 [litigation privilege raised and considered for the first time on appeal].)

Finally, contrary to plaintiff's suggestion, the litigation privilege bars all of plaintiff's claims, even those premised on an alleged violation of her right to privacy.[6] In *Jacob B. v. County of Shasta* (2007) 40 Cal.4th 948, 958, the plaintiff argued that because the communication at issue "broke confidentiality laws, it was not permitted by law and [the writer] was not authorized by law to communicate the information to the court." The court rejected this argument, holding that "[j]ust as the privilege extends to communications otherwise within section 47(b)'s reach that are perjurious, it also extends to communications otherwise within its reach that might be deemed confidential." (*Id.* at p. 959.) Accordingly, the litigation privilege applies in the present action irrespective of whether the declaration contained false statements or disclosed potentially private information about plaintiff's mental health. Therefore, plaintiff could not possibly prevail in the litigation and defendant's special motion to strike was properly granted.[7]

Disposition

The order granting the motion to strike and dismissing plaintiff's complaint is affirmed.

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[6] For this reason, we need not decide whether the trial court properly restricted plaintiff's claims to the causes of action for medical malpractice alleged in her complaint.

[7] Plaintiff's argument that the trial judge had a sua sponte duty under section 107.1 to recuse himself in this matter is without merit. The fact that in 2005 the trial judge made the initial custody decision in the underlying family court action and thereby acquired familiarity with the parties is not a sufficient basis to disqualify him from ruling on the motion to strike in the present action. The judge acquired his familiarity with the parties in the course of performing his judicial functions and did nothing to suggest that he developed a bias in favor of or antagonistic to any of the parties in this action. In all events, as indicated above, we have independently reviewed his challenged ruling and conclude that it is correct as a matter of law.

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Pollak, J.

We concur:

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McGuiness, P. J.

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Siggins, J.